FILED

98 313 AUG 18 1998

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SONNY GIBSON,
Petitioner,

vs.

GERALDO RIVERA, TRIBUNE COMPANY, THE INVESTIGATIVE NEWS GROUP, INC., ASAP/GOODNIGHT AMERICA, INC., MARTIN BERMAN, PENNY PRICE, CBS TELEVISION, INC. and KCBS-TV LOS ANGELES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

GARY L. BOSTWICK
Counsel of Record

PAUL L. HOFFMAN

BOSTWICK & HOFFMAN LLP

100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401
(310) 260-9585

Counsel for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

53 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in *Hustler Magazine v. Falwell* prevents the assertion of a common law fraud claim without a showing of constitutional malice when a person is fraudulently induced to appear on a live television talk show?

2. Whether this Court's holding in *Philadelphia Newspapers, Inc. v. Hepps* or any other case requires a private-figure plaintiff to demonstrate constitutional actual malice to recover proven compensatory damages caused by the defamation?

PARTIES TO THE PROCEEDINGS

Petitioner Sonny Gibson was the plaintiff in the Superior Court of the State of California for the County of Los Angeles, the Appellant and Petitioner in the Court of Appeal, Second Appellate District and the Supreme Court of the State of California. Geraldo Rivera, Tribune Company, The Investigative News Group, Inc., ASAP/Goodnight America, Inc., Martin Berman, Penny Price, CBS Television, Inc. and KCBS-TV Los Angeles were Defendants and Respondents in those same courts. John Richardson, Premiere Magazine, Brian Patrick Clarke and Christine Stearns were defendants who were dismissed in the Superior Court, said dismissals not being appealed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDINGS ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL RAISES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS. 6

A. The Court Should Resolve Conflicts Among the Circuits and Clarify the Law Regarding the Extent of First Amendment Protection for Journalists' Misrepresentations to Interview Subjects. 8

B. The Issue of Whether a Private Figure Plaintiff Must Prove Constitutional Malice To Obtain Actual Compensatory Damages is an Important Question this Court Should Resolve 12

CONCLUSION 14

Page

APPENDICES

APPENDIX A
Opinion of the Court of Appeal, 2nd Appellate District dated March 2, 1998 ..... 1a

APPENDIX B
Order Denying Petition for Rehearing dated April 1, 1998 ..... 18a

APPENDIX C
Order by the Supreme Court of California Denying Petition for Review dated May 20, 1998 ..... 19a

APPENDIX D
Order by the Superior Court of the State of California for the County of Los Angeles Granting Partial Summary Judgment for Defendants and Clarke, dated February 26, 1996 ..... 20a

Page

APPENDIX E

Order by the Superior Court of the State of California for the County of Los Angeles Granting Summary Adjudication and Summary Judgment for Defendants dated February 7, 1997 ..... 23a

APPENDIX F

Order of Dismissal by the Superior Court of the State of California for the County of Los Angeles 27a

TABLE OF AUTHORITIES

Page

CASES

Desai v. Hersh,
719 F.Supp 670 (N.D. Ill. 1989) 13

Desnick v. American Broadcasting Companies, Inc.,
44 F.3d 1345 (7th Cir. 1995) 11

Dietemann v. Time, Inc.,
449 F.2d 245 (9th Cir. 1971) 10, 11, 12

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
471 U.S. 749 (1985) 7

Food Lion v. Capital Cities/ABC, Inc.,
887 F.Supp. 811 (M.D.N.C. 1995) 9, 10

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 7

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 6, 8, 9, 10, 11, 12

New York Times v. Sullivan,
376 U.S. 254 (1964) 10

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 7, 8

TABLE OF AUTHORITIES (cont'd)

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment I . . . . . *passim*

Page

STATUTES

28 U.S.C. § 1257 2

OTHER

Robert A. Smolla, Law of Defamation,
§§3.02-3.06 (1997) 7

Sonny Gibson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District for the State of California dated March 2, 1998 is reprinted in the Appendix to this petition at 1a ("Pet.App."). The order Denying Petition for Rehearing by the Court of Appeal dated April 1, 1998 is reprinted in the Appendix at 18a. The Order by the Supreme Court of California Denying Petition for Review dated May 20, 1998 is reprinted in the Appendix at 19a. The Order by the Superior Court of the State of California for the County of Los Angeles Granting Partial Summary Judgment for Defendants and Clarke, dated February 26, 1996 is reprinted in the Appendix at 20a. The Order by the Superior Court of the State of California for the County of Los Angeles Granting Summary Adjudication and Summary Judgment for Defendants dated February 7, 1997 is reprinted in the Appendix at 23a. The Order of Dismissal by the Superior Court of the State of California for the County of Los Angeles is reprinted in the Appendix at 27a.

JURISDICTION

The Court of Appeal issued its opinion on March 2, 1998. Pet.App. 1a. The Court of Appeal denied a timely

Petition for Rehearing on April 1, 1998. A petition for discretionary review by the California Supreme Court was filed on April 13, 1998. That Petition was denied on May 20, 1998. Pet.App. 19a The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner Sonny Gibson ("Gibson") was the victim of an increasingly frequent phenomenon on television talk shows called the "ambush." The ambush is a fraud that culminates with a talk show host surprising a guest on camera with allegations that he or she is unprepared to respond to. It is usually accompanied by stimulated (and frequently simulated) confrontation with other guests.

On April 25, 1994, Plaintiff Sonny Gibson ("Gibson") received a telephone call from Respondent Price, claiming to be a producer of "The Geraldo Show." Price represented to Gibson that the topic of an upcoming Geraldo Show was "Women Who Married Men in the Mafia" (the "Show") and that the Show needed Gibson, who had experience in the mafia, to be a guest on the Show along with mafia wives.

Gibson expressly conditioned his appearance on Respondents' agreement to report that he had reformed and was working as an actor and to highlight his work attempting to educate youngsters on the dangers of drug use as well as his acting career. Price represented to Gibson that Respondent Rivera would introduce Gibson as an actor, author and an individual helping youngsters to avoid the risks of drugs.

Several days later, Price again telephoned Gibson and made further representations and promises regarding Gibson's appearance on the Show. She informed Gibson that they would open the Show with a film clip of Gibson crashing through the skylight firing at drug dealers.

On Tuesday, May 3rd, the day of the taping, a limousine arrived to transport Gibson to a satellite studio. In the meantime, unbeknownst to Gibson, the show was preparing to air from another Los Angeles location. Gibson was taken to a small room with a camera and a chair. Shortly afterwards, the studio personnel asked Gibson to look in the camera so they could focus the camera. He could not hear or see anything going on at the show's main location. The camera people asked Gibson to nod his head

and smile. Gibson did not know that at that very moment his image was being broadcast live onto a large screen on the main "Geraldo" set and being broadcast on the air as a "producer in Hollywood" who sexually harassed two actresses.

Gibson had no idea that two women in disguise were accusing him of sexually harassing them while he was looking pleasantly into the camera. Thereafter, Rivera spent several minutes with "guests" who accused Gibson of sexual improprieties.

Then Rivera activated Gibson's microphone and earphone. When Rivera introduced Gibson, Gibson, in a bizarre juxtaposition to what had just been said about him, pleasantly said, "Good afternoon, Geraldo, how are you today?"

Rivera immediately began firing inflammatory questions at Gibson about his past. Gibson tried to reply and said he was not proud of his past. Rivera then catalogued Gibson's crimes from 20 years before. Rivera never mentioned Gibson's reformation, his acting career or his work with youngsters as Price had promised.

Rivera told Gibson that the women in the studio claimed Gibson had sexually harassed them. Gibson told Rivera that the women were lying. Gibson began saying that the show had misled him and Rivera had defrauded him, but Rivera talked over him would not let him talk. Gibson repeatedly attempted to explain to Rivera that the women making the accusations were not telling the truth. Rivera outshouted Gibson. Gibson tried to explain that he

had been misled as to the topic of the show. Rivera laughed and ordered Gibson's microphone cut off so that he could not be heard. Gibson then took off his own earphone and microphone and left the remotely located studio.

Gibson had arranged to send notices to hundreds of casting directors that he would be appearing on the "Geraldo" show. As a result, when the show aired, Gibson was damaged over and above what he would have suffered without the ambush because he had notified influential people to watch his appearance on a show that they otherwise were unlikely to watch.

An expert testified that the shows that are expressly "issue-driven" like "Geraldo" must present drama and controversy. Controversy is achieved by the presentation of opposing views, personified by opposing guests. The expert's opinion was that if Gibson refused to participate in the episode, the "Geraldo" Show would not have named Gibson or accused him of sexual misconduct. Gibson is not a celebrity. Gibson's name would not have been mentioned on the Show because his name alone or even his name and picture would have been meaningless to the audience and of no production or promotional value to the program. The only value that Gibson could provide the "Geraldo" Show was providing the drama and excitement of a confrontation between the accused and his accuser(s).

Gibson alleged and offered evidence of the cancellation of three lucrative film projects as a direct result of the show. A $5 million dollar financing agreement for a film starring Gibson was terminated. He supplied the court with other evidence of special damages arising to

millions of dollars. The trial court also had before it evidence of his general damages.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL RAISES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS.

This case arises in the context of a tabloid media "ambush," on a live television show -- a context in which the privacy rights of an increasingly broad array of people are in jeopardy. The television show here employed the "ambush" technique used on unsuspecting private persons like the Petitioner to create "entertainment" and to boost revenues.

The fraudulent practices employed by the Geraldo Rivera Show to trick Petitioner into being an accomplice in his own public humiliation give rise to traditional tort claims under state law. However, the California Court of Appeal, believing it was following this Court's mandate in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), granted the defendants in this case a blanket First Amendment immunity from state law accountability for such outrageous -- and otherwise actionable -- practices. The First Amendment should not be used to shield the kind of fraudulent practices involved here from judicial scrutiny.

The Court should take this opportunity to define the

limitations of its decision in the *Falwell* case as well as resolve conflicts between the leading Circuit Court cases in the area of journalists' misrepresentations so that private parties damaged by tabloid media's fraudulent conduct may obtain compensation for the injuries caused by such exploitive practices, consistent with First Amendment protections.

This case also raises important issues in this Court's continuing "struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). The California Court of Appeal, believing it was adhering to this Court's command in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986), required Petitioner, a private figure plaintiff, to prove constitutional malice in order to obtain actual compensatory damages simply because he also sought punitive damages in this case. No case by this Court has so held.

The Court of Appeal's error derives from the uncertainty caused by this Court's decisions in *Philadelphia Newspapers* and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), concerning the First Amendment limitations on private figure defamation cases. *See generally* Robert A. Smolla, Law of Defamation, §§ 3.02-3.06 (1997).

This Court should take this opportunity to clarify its First Amendment jurisprudence in the context of private figure defamation suits against the media. The First

Amendment should not limit the ability of private figures like Petitioner herein to obtain actual compensatory damages against media defendants under traditional state law defamation principles so long as they prove some degree of fault by a preponderance of evidence, as required by this Court's cases. Although California is free to adopt the higher requirement of actual malice if it chooses, it has not done so and the Court of Appeal imposed this First Amendment obstacle on Petitioner only because it believed it was compelled to do so by this Court's decision in *Philadelphia Newspapers*.

A. The Court Should Resolve Conflicts Among the Circuits and Clarify the Law Regarding the Extent of First Amendment Protection for Journalists' Misrepresentations to Interview Subjects.

The Court of Appeal relied upon this Court's decision in *Falwell* for dismissal because it asserted that Petitioner had not shown damages caused by anything more than the *content* of the show. He could not assert his fraud claim, the court insisted, because of the First Amendment. This reliance extends *Falwell* far beyond its holding and provides an unwarranted immunity for "ambush" tabloid shows of this kind. This Court should take this opportunity to make clear that *Falwell* does not provide such an open-ended immunity for such exploitive practices.

The *Falwell* case considered only whether different damages or different names used for the same damages could be recovered for the *same behavior* that would be constitutionally protected and answered that question in the

negative. *Falwell*, 485 U.S. at 52. This case poses a separate question: May separate causes of action and damages therefrom based upon *distinct behavior* survive in spite of the fact that the defamation that also occurred is non-actionable.

The crux of the issue in *Falwell* was described by this Court in the following way: "Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication." *Falwell*, 485 U.S. at 52. This Court concluded "that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.*, at 52.

Thus, this Court held that reputational damages that were caused by publication of words alone, no matter what they were called, were subject to constitutional defenses. However, this Court's holding in *Falwell* should not be read as authorizing an immunity from torts arising out of conduct which is not dependant on the content of expression. Here, Petitioner would have had a valid fraud claim even if the statements made about him on the Show were true.

Other courts have understood this distinction. For example, recently, in *Food Lion v. Capital Cities/ABC, Inc.*,

887 F.Supp. 811 (M.D.N.C. 1995), a district court considered the interplay of First Amendment and state common law tort issues, including fraud, arising from the use of hidden cameras by ABC's "Prime Time Live" in the nonpublic areas of a supermarket for later broadcast. The *Food Lion* court distinguished between damages to reputational injury and non-reputational injury in the appropriate manner. *Id.* at 34-35.

Petitioner raised an even stronger claim than the plaintiffs in *Food Lion*. He asserted and offered evidence that the reputational damage would not have occurred *at all* if the fraud had not preceded it. He stated that he would not have gone on the show if he had known the truth about its theme and thrust. The evidence that he abruptly walked off the program once he realized the fraud reinforces that contention.

The clear delineation of First Amendment protections established in *Falwell* vis-a-vis non-defamation state law tort claims is of crucial national importance in marking the boundaries of appropriate media conduct in gathering the news. This case provides a vehicle for this Court to clarify these issues in an increasingly common and important context.

The tension between a private party's ability to use ordinary common law tort claims to redress the "calculated misdeeds" of the media in its relentless pursuit of ratings and the protection of First Amendment breathing space is reflected in the case law. A leading case allowing such tort claims with evidence of "calculated misdeeds" to proceed in the face of an assertion that *New York Times v. Sullivan*,

376 U.S. 254 (1964) and its progeny prohibited liability is *Dietemann v. Time, Inc*, 449 F. 2d 245, 248 (9th Cir. 1971).

The "calculated misdeed" in *Dietemann* was the use of lies to obtain entry into the plaintiff's home so that the press could surreptitiously tape him for a program labelling him as a "quack." The scheme in *Dietemann* was, in principle, no different than the more elaborate and more devastating scam devised by the defendants in this case.

In *Dietemann* the Ninth Circuit rejected any attempt to limit the plaintiff's damages for invasion of privacy based not only on the invasive newsgathering techniques, but also on the increased damages caused by their publication in the media. 449 F. 2d at 250. As Judge Hufstedler emphasized, "[i]t does not chill freedom of expression. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed." *Id.* This analysis applies with even greater force in the circumstances of this case.

Revealing the division among Circuit courts on these issues, the Seventh Circuit more recently took the opposite approach in rejecting a plaintiff's ability to assert newsgathering torts in the context of similar tabloid media excesses in *Desnick v. American Broadcasting Companies, Inc.*, 44 F. 3d 1345, 1354-55 (7th Cir. 1995). The *Desnick* court, like the Court of Appeal below, reached the conclusion that this Court's decision in *Falwell* immunized media from liability for fraud, or other tort liability, for the

full range of fraudulent practices the media might employ to obtain material for its program or trap unwitting members of the public into becoming targets of such "calculated misdeeds" to obtain "news." *Id.*, at 1355.

The *Desnick* decision and the California Court of Appeal's decision here, if not restricted by this Court, will empower the tabloid media to operate in accordance with its own laws, wholly unaccountable under traditional common law principles. Such an abdication of privacy and other traditional common law rights is not justified, as the Ninth Circuit found in *Dietemann*, by any countervailing First Amendment principle that is worthy of recognition by this Court.

This Court's decision in *Falwell* was read too broadly by the Court of Appeal, just as it has been read too broadly by other courts. This Court should grant this Petition to restore the proper balance between the legitimate rights of members of the public to be free from the "calculated misdeeds" of the media and the legitimate First Amendment interests of the media.

B. The Issue of Whether a Private Figure Plaintiff Must Prove Constitutional Malice To Obtain Actual Compensatory Damages is an Important Question this Court Should Resolve.

The Court of Appeal held that "where, as here, the allegedly defamatory speech involves a matter of public concern, even a private figure such as Gibson must prove

the falsity of the statements and demonstrate actual malice with convincing clarity if presumed or punitive damages are sought." Pet.App. 9a.

Though this holding accurately states this Court's direction that a private figure plaintiff must demonstrate constitutional malice to obtain presumed or punitive damages, the Court of Appeal exceeded the bounds of the law to state that Petitioner must overcome this First Amendment obstacle to obtain *any* damages, including actual compensatory damages.

The constitutional principle should be made clear that private figures may recover compensatory damages upon proof of fault without meeting the special First Amendment burdens required of Petitioner by the Court of Appeal. This principle has been clear in California law, and in the law of most states, for generations and only the confusion created by this Court's attempts to secure First Amendment breathing space for media defendants can explain why the Court of Appeal here abandoned these clear principles of state law to erect new First Amendment barriers not required by this Court's decisions.

The Court of Appeal is not the first court to interpret this Court's cases as requiring a private figure plaintiff to prove constitutional malice if that plaintiff was seeking. *See, e.g., Desai v. Hersh*, 719 F.Supp. 670, 673 (N.D. Ill. 1989). Clarity is called for in this realm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gary L. Bostwick
Counsel of Record

Paul L. Hoffman
BOSTWICK & HOFFMAN, LLP
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401

Counsel for Petitioner

APPENDIX A

APPENDIX A

Sonny GIBSON, Plaintiff-Appellant,

v.

Geraldo RIVERA, et al.,

Defendants and Respondents

No. BC 110609

Court of Appeal of the State of California,

2nd Appellate District

Division Seven

SUMMARY

Plaintiff was induced under false pretenses to appear on the television show "Geraldo," where he was "ambushed" by other guests' accusations of sexual misconduct and harassment. This appeal follows the trial court's grant of motions for judgment on the pleadings and summary adjudication dismissing plaintiff contract, defamation and related tort causes of action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and appellant Sonny Gibson (Gibson) is a self-described "Mafia Kingpin," a "vicious hit man, high paid gigolo, drug smuggler and con artist." He claims to have murdered 14 people and to have been convicted of at least 4 felonies, including fraud. His life experiences are chronicled in his autobiography *Mafia Kingpin: The True Story of Sonny Gibson* (1985). Since his release from prison in 1980, Gibson has been a television and motion picture actor. Gibson-whose personal motto is "anyone can change"-has also become an activist who works with endangered youth to try to dissuade them from a life of crime.

In April 1994, defendant and respondent Penny

Price, a producer of "The Geraldo Show,"[1] asked Gibson to appear on an upcoming episode. Gibson claims Price told him the show's topic was "Women Married to Men in the Mafia," and that the show needed him as a guest because of his Mafia experience. Gibson agreed on the condition that Respondents agree to highlight his acting career and his work educating children on the dangers of drug abuse. Then, excited about the prospect of the favorable publicity, Gibson notified hundreds of people, including casting directors and potential business associates, about his upcoming appearance on "Geraldo." Geraldo (which is usually taped in New York) was broadcast live from Los Angeles on May 3, 1994. Unbeknownst to Gibson, that day's show was not intended to focus on "Mafia wives," but on "casting couch abuses," *viz.*, sexual harassment in Hollywood. During the first few moments of the show, two women (disguised by wigs, sunglasses and the false names "Patty [sic] and "Maria") talked about their experiences with Gibson. Each said Gibson had claimed to be a producer and that she had met with him for an audition. The audition was a ruse. Instead, Gibson made unwanted sexual advances to the women, which included nudity, touching, rape and displays of himself in nude photos and pornographic films. Because the women were afraid of him, Gibson was not permitted to be present on the set, but was filmed from a remote studio location. Although the studio

---

[1] The respondents in this appeal are Price, talk show host Geraldo Rivera, Tribune Company, The Investigative News Group, Inc., ASAP/Goodnight America, Inc., CBS Television, Inc., KCBS-TV Los Angeles and Martin Berman, each of whom is associated with the "Geraldo" show. For the sake of simplicity, these persons will be referred to collectively as "Respondents."

was purportedly equipped with two way audio and one way video, Gibson was not allowed to see the show or hear what the women were saying, but his face was broadcast during their accusations. Each woman identified Gibson as her harasser. Two other guests corroborated the women's stories about Gibson's deceptive behavior.[2]

When Gibson's audio feed was turned on Rivera immediately began asking him questions about his criminal history. Rivera catalogued Gibson's crimes, and repeated the remarks of prosecutors who had referred to Gibson as a "liar, skunk and an S.O.B.," and called him a "leach on society who conned innocent victims out of large sums of money." Rivera, who told the audience Gibson was asked to appear on the show to discuss "the controversial aspects of show business," did not mention Gibson's acting career or his work as an activist. When Rivera told him about the women's accusations of harassment, Gibson denied them and tried to explain that the women were lying. He was unable to do so however, because Rivera and the studio guests outshouted or spoke over him. Gibson also tried to explain that he had been misled about the topic of the show, but Rivera cut off his microphone. At this point, approximately 10 minutes into the show, Gibson left the studio.

Gibson's First Amended Complaint for damages against defendants John Richardson, K-III Magazine

---

[2] These two guests, Gibson's former secretary Chris Stearns and actor Brian Patrick Clarke, were once defendants in this action. Gibson has not appealed their dismissals.

Corporation and Respondents was filed on August 12, 1994. The complaint alleged causes of action for: fraud and deceit; conspiracy to defraud; breach of oral contract; promise without intention to perform; promissory estoppel; intentional infliction of emotional distress; and intentional and negligent misrepresentation.[3]

On February 26, 1996, an order was entered granting Respondents' motion for summary judgment on all claims except the contract and promissory estoppel claims, and intentional infliction of emotional distress (on which the court granted judgment on the pleadings). On February 28, 1996, with leave from the court, Gibson filed an "Amendment to First Amended Complaint" adding a cause of action for defamation against Respondents. Following an October 25, 1996 hearing on Respondents' second summary judgment motion, the trial court found that Gibson was a "public figure" and that he had not shown "actual malice" on Respondents' part by clear and convincing evidence, and granted the motion on the defamation claim. Gibson proceeded on his contract and promissory estoppel causes of action.

On February 7, 1997, an order was entered dismissing Gibson's remaining causes of action after the trial court found that his claims for damages were the product of speculation and conjecture. This timely appeal followed.

---

[3] Gibson's cause of action for intentional misrepresentation was dismissed on December 7, 1994. On September 27, 1995, all his claims against Richardson and K-Ill Magazine were dismissed on summary judgment.' Gibson does not appeal these dismissals.

DISCUSSION

Gibson argues the trial court committed reversible error when it found that he: (1) was a "public figure" who failed to demonstrate the existence of any material factual dispute as to whether Respondents' conduct rose to the level of "actual malice" by their purposeful avoidance of the truth; (2) failed to demonstrate a causal nexus between Respondents' misrepresentations and his damages; and (3) was entitled to no damages on his contract claim. We address these arguments seriatim.

1. Although he is a private figure for purposes of this litigation, Gibson has not shown actual malice with convincing clarity.

a. The standard of review.

We review First Amendment defamation actions, as we do all summary judgment cases, to see whether the record, construed most favorably to the losing party below, reveals the existence of genuine issues concerning facts which, if proven, would support a verdict in his favor. (*Reader's Digest Assn, Inc.* v. *Superior Court* (1984) 37 Cal.3d 244, 252.) However, if the plaintiff is a public figure a verdict in his favor for defamation can only be supported when he has shown actual malice by clear and convincing evidence; the evidence and all inferences which can reasonably be drawn from it must meet this higher standard. (*Ibid; Anderson* v. *Liberty Lobby, Inc.* (1986) 477 U.S. 242, 256-257.) Even private-figure plaintiffs must prove at least

negligence in order to recover damages and, if punitive damages are sought or the allegedly defamatory speech relates to a matter of public concern, they too must prove actual malice. *(Brown* v. *Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747; *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 347 and 349.)

The first issue-whether Gibson is a public or private figure-is a question of law. *(Stolz* v. *KSFM 102 FM* (1994) 30 Cal.App.4th 195,203-204.) The trial court's decision on this issue is a mixed question of law and fact. That court determines the predicate facts on which it then decides whether the plaintiff is a public figure as a matter of law. *(Weingarten v. Block* (1980)102 Cal.App.3d 129.) We review that decision to determine whether, after an independent review of the entire record, substantial evidence supports the trial court's conclusion. *(Id.* at pp.134-135.) For the reasons stated below, we conclude the trial court erred when it concluded that Gibson was a public figure.

b. Gibson is a private figure for purposes of this litigation.

The Supreme Court has defined two classes of public figures: the "general" or "all purpose" public figure who has "achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," and the "limited purpose" or "vortex" public figure, who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *(Gertz, supra,* 418 U.S. at pp.351-352.)

Notwithstanding his colorful life history and extensive efforts at self-promotion, we conclude Gibson has not achieved the "persuasive fame or notoriety" necessary to qualify him as a public figure for all purposes. *(Gertz, supra,* 418 U.S. at p.351; *Stolz, supra,* 30 Cal.App.4th at p.205 [general public figure must occupy a position of general fame and pervasive power and influence in the community in which allegedly defamatory speech is published].) We also conclude that Gibson was not a limited purpose public figure. Two important elements are required before a person may be deemed a limited purpose public figure: (1) A public controversy must already exist or be manufactured by the plaintiff; and (2) the plaintiff must be involved in *that* controversy. Of these, the most important factor is the voluntariness of plaintiff's involvement in the controversy. Thus, we must search for evidence of plaintiff's "affirmative" efforts to "thrust [himself] into the forefront of particular public controversies." *(Reader's Digest, supra, 37* Cal.3d at pp. 254-255.) Here, the "particular public controversy" was sexual harassment, and there is simply no evidence in the record that, despite his unsavory personal history, Gibson has ever "undertaken [any] voluntary act through which he [has sought] to influence the resolution of the public issues involved" in the societal discourse on sexual harassment.[4] *(Reader's Digest, supra,* 37 Cal.3d at p.254.)

---

[4] There can be no dispute that the public controversy requirement is satisfied. *(Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1021 ["sexual harassment and violence against women is of pressing public concern."].)

c. Gibson has not demonstrated actual malice with convincing clarity.

Our conclusion that the trial court erred when it found Gibson to be a public figure is, for two reasons, a distinction without substantive difference. First, Gibson has not alleged or sought leave to allege that Respondents' conduct was merely negligent. More importantly, where, as here, the allegedly defamatory speech involves a matter of public concern, even a private figure such as Gibson must prove the falsity of the statements and demonstrate actual malice with convincing clarity if presumed or punitive damages are sought. (*Brown, supra,* 48 Cal.3d at pp. 747, 753, fn. 37; *Philadelphia Newspapers, Inc.* v. *Hepps* (1986)475 U.S. 767, 776.) To meet this burden, Gibson must show by clear and convincing evidence that Respondents published the communication either knowing it was false, or with reckless disregard for the truth (*i.e.,* a "high degree of awareness of.. probable falsity," or that they "in fact entertained serious doubts as to the truth of [the] publication"). (*Harte-Hanks Communications, Inc.* v. *Connaughton* (1989) 491 U.S. *657,* 666-667, quoting St.Amant v. *St. Amant v. Thompson* (1968) 390 U.S. 727, 730.)

Alternatively Gibson may prevail if he can show Respondents had "obvious reasons to doubt the veracity" of the accusations against him, *St. Amant, supra,* 390 U.S. at p.732, but engaged in "purposeful avoidance of the truth." (*Harte-Hanks, supra,* 491 U.S. at p. 692.) Mere negligence is not enough. "Even an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice; nor will any other departure from

reasonably prudent conduct, including the failure to investigate before publishing." *(Eastwood v. National Enquirer, Inc.* (9th Cir. 1997) 123 F.3d 1249, 1251 [citation]; *see also St. Amant, supra,* 390 U.S. at p.733 ["Failure to investigate does not in itself establish bad faith."].) The test is subjective; Respondents' actual belief in the truth of the publication is pivotal. *(Reader's Digest, supra. 37* Cal.3d at p.257.)

Gibson argues there is convincing evidence of Respondents' actual malice because Respondents: (1) failed to verify the factual bases for the women's stories, and (2) purposely chose not to ask him about the accusations in order to preserve the dramatic impact of their planned "ambush."

Turning to the record on the first contention, Gibson claims that Respondents did not substantiate the facts of "Maria's" or "Patty's" stories, and had no evidentiary basis which justified their belief of the women's accusations. We disagree. First, Respondents produced evidence that they first became interested in Gibson after several unsolicited phone calls identified him as a sexual harasser. After deciding to cover the "casting couch" topic, Price and her staff spoke with professional guild representatives who confirmed that numerous complaints of sexual misconduct had been lodged against Gibson, accusations which were generally corroborated before and during the show by Stearns and Clarke. Respondents also produced the deposition testimony of Vicky Shapiro, in-house counsel for the Screen Actor's Guild who: (1) confirmed that there were Guild complaints about Gibson's sexual misconduct dating back to 1985; (2) testified that she met with "Maria" and

Clarke when Maria came to the guild to lodge her complaint about Gibson's harassment; and (3) despite Gibson's assertion that he "has no personal knowledge of any sexual harassment complaints filed with the Screen Actors Guild," produced evidence that Gibson had known of (and denied) such accusations since at least November 1993. In addition, Stearns, Maria and Patty each warranted she would not say anything on the show "that [she knew] or believe[d] to be false or defamatory." Finally, Respondents obtained extensive information about and evidence of Gibson's criminal history. While this evidence did not relate directly to the accusations of harassment, it does lend credence to Respondents' contention that, based on the totality of evidence, they had no reason to doubt the veracity of the harassment allegations.

We also reject Gibson's contention that actual malice is established because Respondents did not question him in advance about the accusations, and relied on the results of investigative work of Price and her staff. Respondents were not required to confront Gibson with the accusations. (*Eastwood, supra,* 123 F.3d at p.1254, fn. 10.) And, although Respondents claim they would have permitted Gibson to rebut the charges if he had not walked off the show, they had no obligation to do so. There is no duty to present an objective account, or even an accurate one. (*Reader's Digest, supra, 37* Cal.3d at p.259 [Citations].) Indeed, as "long as he has no serious doubts concerning its truth, a publisher] can present but one side of the Story .... Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically

less objective in its presentation." *(Ibid; Secord* v. *Cockburn* (D.D.C. 1990) 747 F.Supp. 779, 789 [plaintiff cannot rely on defendant's failure to consult with him prior to publication as proof of "actual malice"].) In addition, a defendant's reliance on the investigation results of a reputable source may shield him from liability. *(Masson v. New Yorker Magazine, Inc.* (9th Cir. 1992) 960 F.2d 896, 902-903.) Here, Respondent Rivera testified he relied on Price's professional investigation because "going back to... the 1970s-[she had] not been factually wrong about any of the guests in the scores of programs that [they'd] produced." The remaining Respondents were similarly entitled to rely on Price.[5]

2. Gibson has shown no damage as a result of Respondents' misrepresentations.

The trial court granted summary adjudication on Gibson's causes of action for fraud, conspiracy, negligent misrepresentation and promise without intent to perform.[6] The court found that Gibson was unable to establish one or more elements of these claims, and that any damages Gibson may have sustained flowed directly from the content of the allegedly defamatory speech.

Once a defendant moving for summary judgment has shown that an essential element of plaintiff's cause of action

---

[5] Because Gibson has not raised a triable issue as to actual malice, we need not address the question of whether the speech was also false.

[6] Gibson abandoned his conspiracy claim.

cannot be established, the burden shifts to the plaintiff to set forth specific facts showing a triable issue of material fact as to that cause of action. If he fails to do so, summary judgment must be granted. (Code Civ. Proc., § 437c, subds. (n), (o)(2).) Moreover, because summary judgment is a favored remedy in defamation actions (due to the chilling effect of protracted litigation on First Amendment Rights), "the courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. (*Couch* v. *San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1498-1499.) Absent such a showing, the motion should be granted. (*Id.* at p.1499.) As Gibson correctly conceded below, "if the only thing [a plaintiff is] complaining about [is] the publication, and that's the only operative act, then [it doesn't matter] what you call the cause of action. It's protected by the First Amendment." In other words, we look "behind the label affixed to the complaint and examine[] the gravamen of the claim." (*Fellows* v. *National Enquirer, Inc.* (1986) 42 Cal.3d 234,240 [if complaint is based on an offensive statement, plaintiff may not circumvent constitutional limitations by proceeding on a theory other than defamation]; *Hustler Magazine* v. *Falwell* (1988) 485 U.S. 46, 56.) Thus, to the extent Gibson's tort claims were merely an attempt at "creative pleading" designed to avoid the constitutional protections afforded speech, they were properly dismissed. (*Blatty* v. *New York Times Co.* (1988) 42 Cal.3d 1033.)

Gibson argues that his injuries resulted not just from the alleged defamation, but also from the fact that he was duped by Respondents' misrepresentations into appearing on

the show at all, and thereby made an unwitting participant in his own humiliating downfall (because of the way in which the show was presented and because he asked individuals on whom he depended for fixture income to view the show). However, he also candidly concedes he has no evidence that any contract was canceled just because he appeared on the show. In fact, the only evidence of monetary damages Gibson offered at all was the injury he claims to have suffered from business lost after investors or producers learned about the non-actionable *content* of the show. As Respondents correctly assert, "Gibson's mere appearance on the show-no matter how he arrived there-caused him no damage."

In sum, summary adjudication was properly granted for Gibson's failure to establish an essential element of each of his misrepresentation claims.[7]

3. Gibson's contract claim was properly dismissed.

Gibson's final assertion of error relates to the trial court's dismissal of his oral contract claim based on its

---

[7] We also reject Gibson's argument that the trial court improperly excluded the declaration of his expert (who opined that the statements about Gibson would not have been made if he had not appeared on the show), on the ground that it was "irrelevant, incompetent, hearsay, lack[ed] [sic] foundation and [was] mere speculation and conjecture." Such decisions lie squarely within the trial court's discretion; Gibson has shown no abuse. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

finding that his damages were "speculative and conjectural" and thus barred by *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d *850,* and Civil Code section 3301.[8] Gibson claims he contracted to appear on Geraldo to discuss the subject of Mafia wives. His "consideration" for this appearance was Respondents' alleged promise to help promote his acting career and to positively highlight his moral reformation. As a result of Respondents' alleged breach, Gibson claims he lost the "positive publicity and exposure [he] was to receive had [they] lived up to their ... obligations." However, the only evidence in the record to which Gibson points is his unsubstantiated assertions that he lost an acting contract, three film projects and the ability to raise hinds in the fixture as a *direct result of the false accusations* made against him and his appearance on the show. Thus, to the extent that Gibson's contract damages flow directly from the content of the speech, they are defamation damages barred for the reasons discussed above.

Gibson's claim that he lost favorable publicity because Respondents failed to promote his acting career or activism is also independently barred for the reasons stated in *Ericson, supra,* 73 Cal.App.3d 850 (in which plaintiff alleged he had lost publicity as a result of defendant's breach of its agreement to put his photograph on a magazine cover):

---

[8] Gibson does not address the dismissal of the promissory estoppel claim, which is deemed abandoned. *(Cabrera* v. *Plager* (1987) 195 Cal.App.3d 606, 609, fn. 4.)

> "Plaintiffs argument ... is that for an actor all publicity is valuable, and the loss of any publicity as a result of breach of a contract is compensable. Carried to this point, we think his claim for damages becomes wholly speculative. It is possible ... that a motion picture producer viewing the talk show might ... decide to offer him a role in his next production. But it is equally plausible to speculate that plaintiff might have been hurt professionally rather than helped, ... [because] a motion picture producer whose attention had been drawn by the cover of the magazine to its contents depicting plaintiff posing naked ... might dismiss plaintiff from serious consideration for a role .... *The speculative and conjectural nature of such possibilities speaks for itself" (Id. at p.858 [emphasis added].)*

In sum, Gibson has offered no evidence of damages as a result of Respondents' breach "which ... clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.) Contract damages "which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery." *(Scott* v. *Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 473 [citations].)

Finally, Gibson's assertion that the trial court improperly usurped the jury's function by refusing to permit him to proceed on his contract claim despite the

court's recognition of his entitlement to nominal damages, is belied by the record. Indeed, the order of dismissal flatly states Gibson "is entitled to no damages." That ruling is correct. Moreover, even if Gibson was entitled to nominal damages, no legal error occurred. Subject to exceptions not applicable here, "[t]he general rule in contract ... actions is that, where a plaintiff is entitled at most to nominal damages, a judgment, nonsuit or directed verdict against him is not reversible error." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 427, p.474 [citations].)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

NEAL, J.

We concur:

JOHNSON, Acting P.J., concurs in judgment only.

WOODS, J

APPENDIX B

APPENDIX B

Office of the Clerk
Court of Appeal
State of California

Second Appellate District
Joseph A. Lane, Clerk

Division: 7 Date: 04/01/98

Bostwick & Hoffman, LLP
Gary L. Bostwick
100 Wilshire Blvd.
Suite 1000
Santa Monica, CA 90401 1198

RE: Gibson, Sonny
vs.
Rivera, Geraldo et al.,
2 Civil B111432
Los Angeles NO. BC110609

THE COURT:
Petition for rehearing denied.

APPENDIX C

APPENDIX C

FILED MAY 20, 1998

Second Appellate District, Division Seven, No. B111432
S069490

IN THE SUPREME COURT OF CALIFORNIA

SONNY GIBSON, Appellant

v.

GERALDO RIVERA, et al., Respondents

Appellant's petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SONNY GIBSON	)	**NO. BC 110609**
	)	
Plaintiff,	)	**ORDER GRANTING**
	)	**PARTIAL**
vs.	)	**SUMMARY**
	)	**JUDGMENT FOR**
GERALDO RIVERA, et al.,	)	**DEFENDANTS AND**
	)	**CLARKE**
Defendants.	)	
_____	)	Filed: February 26, 1996

The motion of defendants Geraldo Rivera, Martin Berman, Penny Price, The Investigative News Group, Inc., Tribune Company, Tribune Entertainment Company, CBS Television, Inc., KCBS-TV Los Angeles, and CBS, Inc. (collectively, "Defendants") for summary judgment and the motion of defendant Brian Patrick Clarke for summary judgment came on regularly for hearing before this Court in Department 83 on February 22, 1996, Hon. Jan Pluim, Judge Presiding, and Alan Isaacman and Robert Freimuth, of Isaacman, Kaufman & Painter appearing on behalf of Defendants, Bart Ring appearing on behalf of defendant Clarke, and Gary L. Bostwick of Law Offices of Gary L. Bostwick appearing on behalf of plaintiff Sonny Gibson.

After full consideration of the evidence, the separate statements of the parties, and the authorities submitted by counsel, as well as counsel's oral argument, the Court finds:

- That Defendants and Clarke have met their burden of showing that the causes of action for fraud and deceit; conspiracy to defraud; negligent misrepresentation; and promise without intent to perform against them have no merit by showing that one or more elements of each cause of action cannot be established. The Court sustains the Defendants' objections that the declaration of Phyllis Cannon is inadmissible on the grounds that it is irrelevant, incompetent, hearsay, lacks foundation and is mere speculation and conjecture. The Court also finds that the purported damages plaintiff alleges he suffered with respect to the film projects "Maui," "Deadly Ice/No Judge No Jury," and "I'm Not Sleepy" were not caused by any fraud on the part of Defendants or Clarke. As to the actions of these Defendants and Clarke, such damages could have been allegedly caused only by what was said about plaintiff. (i.e., defamation).

- Defendants and Clarke are entitled to judgment on the pleadings as to the cause of action for intentional infliction of emotional distress. The Court will permit plaintiff to amend his complaint to allege a cause of action for defamation within five days. If plaintiff amends his complaint to allege a cause of action for defamation, Defendants will have five days to file a response. The Court will permit what further discovery is necessary.

- Defendants' motion with respect to the causes

of action for breach of oral contract and promissory estoppel are denied.

IT IS THEREFORE ORDERED that the said motions for summary judgment are GRANTED in part and DENIED in part.

Dated: February 26, 1996

_____

Judge of the Superior Court

APPENDIX E

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SONNY GIBSON,	)	**NO. BC 110609**
	)	
Plaintiff,	)	**ORDER GRANTING**
	)	**SUMMARY**
v.	)	**ADJUDICATION AND**
	)	**SUMMARY JUDGMENT**
Geraldo RIVERA, et al.,	)	**FOR DEFENDANTS**
	)	
Defendants.	)	Filed February 7, 1997
_____	)	

The motion of defendants Geraldo Rivera, Martin Berman, Penny Price, The Investigative News Group, Inc., Tribune Company, Tribune Entertainment Company, and CBS, INC. (collectively, "Defendants") for summary judgment or, alternatively, summary adjudication, came on regularly for hearing before this Court in Department 83 on October 25, 1996, the Honorable Jan Pluim, Judge, Presiding, and Alan Isaacman and Robert Freimuth, of Isaacman, Kaufman & Painter appearing on behalf of Defendants, Bart Ring appearing on behalf of defendant Chris Stearns, and Gary L. Bostwick of Law Offices of Gary L. Bostwick appearing on behalf of plaintiff Sonny Gibson.

After full consideration of the evidence, the separate statements of the parties, and the authorities submitted by counsel, as well as counsel's oral argument, the Court finds the following:

Defendants have met their burden of showing that the cause of action for defamation against them has no merit by showing that one or more elements of that cause of action cannot be established.

Plaintiff authored and widely promoted the sale of his autobiography, which contains a litany of his criminal and other anti-social misdeeds. Among the misdeeds which Plaintiff recites in his autobiography are numerous murders, financial swindles, drug trafficking, and his sexual seductions of women for financial and other personal gain. In addition, Plaintiff's publicity materials recite that he has been interviewed in more than 200 magazines, 400 talk shows, and 3,000 newspapers. He has appeared on Good Morning America, the David Letterman Show, and various other nationally locally broadcast shows. Stories about his Mafia activities and his motion picture career have appeared in People Magazine, The Los Angeles Times, and other print media. Also, Plaintiff was the subject of an expose in The Los Angeles Times which alleged that Plaintiff's highly-publicized claims about his life are largely false.

Further, Plaintiff has appeared as an actor in motion pictures and generated publicity in promotion thereof. Also, Plaintiff has placed various promotional ads regarding himself in the entertainment trade papers and in billboard space, such as the well-known billboard space in Times Square, New York, to promote himself and his career. In

addition, Plaintiff has publicized that he has spoken to many thousands of youngsters for the purpose of serving as a moral inspiration to them and to dissuade them from engaging in criminal behavior.

Plaintiff voluntarily went on the "Geraldo" show, with Plaintiff's purported purpose being to publicize his past Mafia association, his current film-making career, and his efforts to serve as a moral inspiration to large groups of young people.

Finally, Plaintiff admits to having thrust himself into the limelight to influence the public with regard to issues concerning (1) his conversion from his past life as a miscreant to a person who no longer engages in anti-social behavior, (2) his film-making career, and (3) his public efforts to encourage young people to avoid drugs and other unlawful behavior. Accordingly, Plaintiff has injected his life into the public arena and has, specifically, thrust himself into controversies related to the statements alleged by Plaintiff to be defamatory. Further, Plaintiff has access to the media and has the ability to engage in counter-speech.

Because Plaintiff is a public figure, he is required to present clear and convincing evidence of actual malice. Plaintiff has failed to meet his burden and Defendants have shown compelling evidence of an absence of actual malice. Therefore, Defendants are entitled to summary judgment on Plaintiff's cause of action for defamation.

Defendants' motion with respect to the causes of action for breach of oral contract and promissory estoppel

is denied.

IT IS THEREFORE ORDERED that the motion for summary judgment of Defendants Geraldo Rivera, Martin Berman, Penny Price, and Tribune Entertainment Company with respect to Plaintiff's cause of action for defamation is granted and that judgment be entered in favor of said Defendants and against the Plaintiff.

IT IS FURTHER ORDERED that summary adjudication is GRANTED in favor of Defendants Tribune Company and The Investigative News Group, Inc., with respect to Plaintiff's cause of action for defamation and it is ordered that Plaintiff's defamation cause of action against Tribune Company and The Investigative News Group, Inc., is hereby dismissed as to said Defendants.

IT IS FURTHER ORDERED that motion of Tribune Company, The Investigative News Group, Inc., and CBS INC., for summary judgment as to Plaintiff's causes of action for breach of oral agreement and promissory estoppel is denied.

Dated: 2/7/97

_____

Judge of the Superior Court
S. James Otero for Judge Jan Pluim

APPENDIX F

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SONNY GIBSON,	)	**NO. BC 110609**
	)	
Plaintiff,	)	**ORDER FOR**
	)	**DISMISSAL**
v.	)	
	)	Filed: February 7, 1997
GERALDO RIVERA, et al.,)		
	)	
Defendants.	)	
	)	

The motion of defendants Geraldo Rivera, Martin Berman, Penny Price, Tribune Entertainment Company, The Investigative News Group, Inc., Tribune Company, and CBS, INC., (collectively, "Defendants") for summary judgment as to plaintiff Sonny Gibson's defamation, breach of oral contract and promissory estoppel causes of action came on regularly for hearing before this Court in Department 83 on October 25, 1996, the Honorable Jan Pluim, Judge, Presiding, and Alan Isaacman and Robert Freimuth, of Isaacman, Kaufman & Painter appearing on behalf of Defendants, Bart Ring appearing on behalf of defendant Chris Stearns, and Gary L. Bostwick of Law Offices of Gary L. Bostwick appearing on behalf of plaintiff Sonny

Gibson. At that time, the Court granted Defendants' motion as to the defamation cause of action and indicated that further argument with respect to the breach of oral contract and promissory estoppel causes of action may be presented at the upcoming Mandatory Settlement Conference and Final Status Conference. Subsequently, the Court requested further briefing with respect to legal issues pertaining to these causes of action.

On December 2, 1996, a hearing was held in Department 83, the Honorable Jan Pluim, Judge, Presiding. Alan Isaacman and Robert Freimuth appeared on behalf of plaintiff Sonny Gibson.

After full consideration of the evidence, the briefs submitted by the parties, as well as counsels' oral argument, the Court finds the following:

Plaintiff's claim for damages alleged in his causes of action for breach of oral contract and promissory estoppel is governed by Ericson v. Playgirl, Inc., 73 Cal.App.3d 850 (1977).

Plaintiff's claim for damages for loss of general publicity is speculative and conjectural and therefore is barred by the Civil Code requirement that damages for breach of contract be clearly ascertainable in both their nature and origin. (Civil Code § 3301.)

Plaintiff is entitled to no damages.

Plaintiff's claims for breach of oral contract and

promissory estoppel are dismissed.

IT IS THEREFORE ORDERED THAT Plaintiff's claims for breach of oral contract and promissory estoppel are dismissed;

IT IS FURTHER ORDERED THAT judgment be entered in favor of all Defendants and against Plaintiff Sonny Gibson.

Dated: 2/7/97

Judge of the Superior Court
S. James Otero for Judge Jan Pluim

FILED
OCT 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-313

In The

Supreme Court of the United States

October Term, 1998

SONNY GIBSON,

Petitioner,

vs.

GERALDO RIVERA, TRIBUNE COMPANY, THE INVESTIGATIVE NEWS GROUP, INC., ASAP/GOODNIGHT AMERICA, INC., MARTIN BERMAN, PENNY PRICE, CBS TELEVISION, INC. and KCBS-TV LOS ANGELES,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

ALAN L. ISAACMAN
Counsel of Record
ROBERT S. FREIMUTH
ISAACMAN, KAUFMAN & PAINTER
Attorneys for Respondents
8484 Wilshire Boulevard
Suite 850
Beverly Hills, CA 90211
(213) 782-7700

149152

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

23 pp

STATEMENT PURSUANT TO RULE 29.6

Respondents in this action are Geraldo Rivera, Martin Berman, Penny Price, The Investigative News Group, Inc., Tribune Company, and CBS INC.

ASAP/Goodnight America, Inc., and CBS-Television, Inc., do not exist as separate legal entities.

The Investigative News Group, Inc., does not have any parent companies or nonwholly owned subsidiaries.

Tribune Company does not have a parent company, and has one nonwholly owned subsidiary, Landoll, Inc.

CBS INC. is now CBS Broadcasting Inc., CBS Corporation is the parent corporation of CBS Broadcasting Inc., CBS Broadcasting Inc. has one nonwholly owned subsidiary, Sportsline, Inc.

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Review is Unnecessary 1

Statement of the Case 1

Statement of Facts 3

Reasons for Denying the Writ 10

I. Traditional Tort Law Addresses Gibson's Fraud Claims. 10

II. Gibson Never Alleged Negligence In His Defamation Claim. 14

III. If The Court Is Inclined To Grant Certiorari, Review Of Petitioner's Status As A Public Figure Is Mandated. 16

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Bostrom v. County of San Bernardino, 35 Cal. App. 4th 1654 (1995) 15, 16

Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995) 14

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 18

Hunter v. Pacific Mechanical Corp., 37 Cal. App. 4th 1282 (1995) 13

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 14

Kirby v. Albert D. Seeno Construction Co., 11 Cal. App. 4th 1059 (1992) 16

Union Bank v. Superior Court, 31 Cal. App. 4th 573 (1995) 13

Statutes:

California Code of Civil Procedure § 437c 13

California Code of Civil Procedure § 437c(n)(1) 13

United States Constitution:

First Amendment 1

REVIEW IS UNNECESSARY

Petitioner Sonny Gibson ("Petitioner" or "Gibson") misstates the holdings of the lower courts in an effort to create issues for review with constitutional ramifications.

The application of traditional state tort law appropriately addresses Gibson's claims for fraud against Respondents. Indeed, Gibson's fraud claims fail because the California appellate court, like the trial court, found that an element of his fraud claims (*i.e.*, damages) was missing — not because the First Amendment was extended to require "actual malice" in order to prevail on a claim of fraud.

Similarly, the appellate court, in its unpublished opinion, rejected Gibson's appeal concerning his defamation claim because Gibson never alleged that Respondents acted negligently. Instead, he alleged that Respondents intentionally made knowingly false statements and were involved in a wide-ranging conspiracy that included magazine writers, paid "shills" who appeared on the "Geraldo" show to intentionally lie about Gibson, and others. Consistent with his theory of the case, Gibson never presented any evidence of negligence on the part of Respondents.

In short, there are no constitutional issues raised by Gibson that this Court need address.

STATEMENT OF THE CASE

Gibson is a convicted perjurer, an admitted swindler, con man, and self-proclaimed Mafia hitman turned actor/producer.[1] He sued Respondents over his appearance on the "Geraldo"

1. Gibson purports to reveal his "true-life" adventures as a former Mafia hitman in a highly-publicized book titled *Mafia Kingpin: The True Story of Sonny Gibson*.

show, wherein several women accused him of sexual misconduct. Gibson initially alleged intentional infliction of emotional distress, fraud, negligent misrepresentation, promise without intent to perform, conspiracy to defraud, breach of oral contract, and promissory estoppel. At that point, Gibson did not sue for defamation. Only after the trial court granted Respondents summary adjudication on the bulk of Gibson's claims, observing that the gravamen of the complaint was defamation, did Gibson amend his complaint to allege defamation.

In granting Respondents summary adjudication on Gibson's claims of fraud and deceit, conspiracy to defraud, negligent misrepresentation, and promise without intent to perform, the trial court and the appellate court properly found that Gibson failed to establish an essential element in each of his misrepresentation claims.

The reason that Gibson went to great lengths to avoid alleging defamation is clear: Gibson does not have a case for defamation.[2]

---

2. At the hearing on Respondents' motion for summary judgment held February 22, 1996, Appellant's counsel made several statements acknowledging that Gibson does not have a claim for defamation, including: (a) "I believe that Mr. Gibson's own statements about his former life make him what is known in the libel world as nearly libel proof;" (b) "I'm the one who made the decision not to sue for defamation;" (c) "But the problem I face when I put this all together was, I don't think it is the content of the show that is what was really done wrong;" (d) "Let me tell you that in one sense I don't believe it's important what was true or false about what was stated on that program, in a way. What's important here is that it was — it was broadcast that way;" and (e) "And I wouldn't be standing here today if all they had done was to publish the same things that they said about him on that show without asking him to come on the show and lying to him about how to get there."

STATEMENT OF FACTS

This suit arises from an episode of the "Geraldo" show which occurred and aired in California on May 3, 1994. The show, "casting couch abuses," dealt with sexual harassment in Hollywood. On the show, several women stated Gibson lied to them to get them to "auditions" only to have Gibson make unwanted sexual advances toward them, including but not limited to unwanted touching and display of Gibson in pornographic movies and nude photos.

In approximately May, 1993, the "Geraldo" show had done a show on sexual harassment in Hollywood. After that show, producer Penny Price ("Price") received a number of telephone calls from individuals identifying Gibson as a sexual harasser in a casting couch scenario. In or about March, 1994, Price suggested that the show revisit the topic of sexual harassment in Hollywood. Price believed the story was timely in that two well-publicized cases of sexual harassment were going on at the time — one concerning the Arsenio Hall show, the other the Wallace Kaye Agency. Then executive producer, Martin Berman ("Berman"), approved the idea.

Price began an intensive investigation for what was to become a show on "casting couch" abuses in Hollywood. She made hundreds of phone calls to pull the story together. She checked the status of the Arsenio Hall and Kaye cases. She contacted the lawyer and complainant suing Arsenio Hall and the attorney for Arsenio Hall.

Price spoke to various unrelated individuals and agencies regarding Gibson. She spoke to investigator Peter Smart and others with the Ventura County (California) district attorney's office who said Gibson was a "liar, a skunk and an SOB." She spoke to the Los Angeles Police Department. Price talked to

various guilds to confirm the complaints of harassment. She was told that there were numerous complaints of sexual harassment against Gibson.

Price contacted Gibson's former secretary (Chris Stearns, the woman who appeared as "Mimi" on the show) through an investigator who had called Price after the prior show on sexual harassment. Stearns corroborated the stories about Gibson's deceptive behavior.

In short, Price interviewed guests, worked with investigators, and talked to guilds, law enforcement officials, and other third-party witnesses about the stories being presented. Geraldo Rivera ("Rivera") testified that Price is very professional and has not been factually wrong about any of the guests in the scores of programs that they have produced. Rivera had no evidence or reason to suspect Price was anything less than totally professional for this show.

Price also hired Kristina Kirstin ("Kirstin") as an associate producer for that show. Kirstin advertised in entertainment industry publications (the "trades") for those who had information about sexual harassment, and took many of the telephone calls generated by the ads. She, too, contacted actors and casting agencies for the show. Kirstin also did an undercover piece on another guest who was accused of sexual harassment.

People who knew Gibson told Price that Gibson would appear on the show because he craved publicity. As she uncovered Gibson's past, Price realized that he was involved with a number of financial scams and numerous lawsuits. Before contacting Gibson, Price spoke with in-house counsel about how to approach Gibson.[3]

---

3. Various people told Price that Gibson passed himself off as a (Cont'd)

None of the foregoing facts, elicited by Petitioner's counsel in deposition, have been challenged or disputed by Gibson.

Price recalled four short conversations with Gibson.

In her initial call to Gibson, Price told him that he had led a very interesting life, noting he was the author of *Mafia Kingpin*. Gibson acknowledged he was the author of *Mafia Kingpin* and told Price he was now a film actor and producer. Price then said, "Well, you've had a very interesting life, from mafia to Hollywood, it's certainly an interesting life. We'd like to have you on to talk about your life." Gibson said he was delighted and asked when the show was. Price testified that it was the shortest phone conversation she had ever had with a guest.

The second phone call Price had with Gibson was two days later. She asked him to send "backup" materials, because it is standard to get books or press kits if guests have them. The third call was made by Gibson's office, offering to come to New York. Price said it was better for Gibson to remain in Los Angeles. In the fourth call, Gibson's office called and said they knew Rivera was going to be in Los Angeles and asked whether Gibson could meet with Rivera or do the show with Rivera in Los Angeles. Price told Gibson it was better to keep the arrangements the same — Gibson in a remote studio.

(Cont'd)
producer, and a number of people and organizations told her that Gibson was involved in a variety of financial scams. For example, the Directors Guild of America informed Price that at one hearing, there were so many people who had complaints against Gibson that the room was not large enough. Gibson did not show up at that hearing because he was not subpoenaed. Price did not pursue the financial aspects of Gibson's dealings because that was not part of the show.

The women who appeared on the show were so frightened of Gibson that they insisted that he be in a separate location. Price promised the women that Gibson would be nowhere near them. It was decided that Gibson would be at another studio. The remote studio was told to do a "straightforward satellite," meaning one-way video and two-way audio. That is standard.

Each of the women who appeared on the show to talk about Gibson signed a "guest release" form, attesting, "I warrant that I will not make any remarks that I know or believe to be false or defamatory in the program."[4]

Rivera asked Price why Gibson was not going to be in the studio, and Price told him that the women were afraid for their lives.

Price and Rivera discussed Gibson's criminal record, including his felony convictions, and the information Price received from the Ventura County district attorney's office (the Ventura County district attorney's office told Price that Gibson was one of the most despicable people that they had ever encountered).

A few days before the show, Price spoke with Brian Patrick Clarke, after the woman identified as "Maria" on the show told Price that Clarke helped her after her experience with Gibson. Clarke appeared on the show.

The fact that the "Geraldo" show was going to be live in Los Angeles during that week was well publicized. Titles of the shows for that week were listed in newspapers and magazines, including *The Los Angeles Times* and *TV Guide*.

4. Although the women who appeared on the show to talk about Gibson did not use their real names on the show, their identities were provided Gibson in discovery during this case.

Billboards in Los Angeles announced the show was in town and live. In fact, Beth Spivack, who, during April and May 1994 and beyond, was the assistant to Gibson and his girlfriend and business partner, Reparata Mazzola, testified that she saw billboards in Los Angeles advertising the fact that "Geraldo" was going to be live in Los Angeles. KCBS ran promotions for the May 3, 1994, show during the previous day's "Geraldo" show.

Rivera stated that the show wanted to get the women's stories out, and then give Gibson the opportunity to rebut any and all of the allegations. As the tape of the show indicates, Gibson left the set at the remote studio no more than 10 minutes into the show. In fact, the show was only in the first of seven segments when Gibson left. Gibson would have had ample opportunity to present his side of the story had he stayed.

Gibson, in his Petition, mischaracterizes what transpired on the show itself. For example, he claims he was asked to smile for the camera and that that image was broadcast while the women described his sexual harassment. The tape of the show simply does not indicate that. The video tape and the transcript of the show do indicate what was broadcast, and the Court need not rely on Gibson's characterization.

There are a number of undisputed facts that Gibson does not acknowledge in his Petition:

- It is uncontroverted that Gibson himself contends that, as of 1993, before the "Geraldo" show, he had been "interviewed in more than 200 magazines, 3,000 newspapers and 400 talk shows." He had appeared on national television talk shows (including "Late Night with David Letterman" and "Good Morning America") and radio shows prior to the "Geraldo" show. His

autobiography, *Mafia Kingpin*, outsold *The Godfather*. He had spoken "to over 10,000 school kids, was interviewed by *People* Magazine, ABC, CBS and NBC affiliates, and prime time news shows." One newspaper article states, "Gibson said he has spoken to more than 600,000 youngsters [about his horrible past deeds and how he has changed] and that he receives thousands of letters thanking him for sharing his experiences." He had rented the famous outdoor billboard space in Times Square in New York City to promote himself. He had taken out full-page advertisements in the "trades." He had appeared as an actor on television and in motion pictures. He had an agent, a manager, and a publicist.

• By his own admission, *Mafia Kingpin: The True Story of Sonny Gibson* is a book based on Gibson's life. In it, he boasts of his "cold, grisly 'hits' and million-dollar fraud schemes" that "made him the most feared and respected man in the Mafia." He calls himself a "brutal robber," the "Mafia's fiercest assassin." He brags "he amassed millions from international scams, building his own personal fortune as a casino owner, narcotics smuggler, and highly paid gigolo with a voracious sexual appetite." The book exults: "He conned innocents, celebrities, and politicians before he was finally sentenced to a state penitentiary. There Sonny continued extorting, pimping, and murdering . . ." Gibson admits to 14 murders, being convicted of at least four felonies including fraud, and being a "criminal Einstein."

• In papers filed with the trial court, *Gibson* admits:

> Gibson thrust himself into the limelight to influence the public on the issue of his

conversion, his acting, and his work to reform juveniles, not sexual harassment.[5]

• After a number of individuals identified Gibson as a sexual harasser to the producers of the "Geraldo" show, the producers made hundreds of phone calls to bring together the show at issue here. They spoke to police agencies, a district attorney's office, entertainment guilds, actors, casting agencies, and Gibson's former secretary. They obtained information about his financial scams, the numerous lawsuits with which Gibson was involved, and his lengthy criminal record. They reviewed the materials Gibson provided, including his autobiography *Mafia Kingpin*.

• Gibson's tale is that the producers of the "Geraldo" show concocted an elaborate scheme to get him on the show by falsely telling him that the show was going to be about "women married to men in the Mafia," and that the show was going to be taped in New York. Yet, there is no dispute that prior to the show, newspaper and magazine advertisements, billboards, and radio and television promotions — all in the Los Angeles area — announced that this particular show was about "casting couch" abuses and that it was going to be done live in Los Angeles. Gibson lived and worked in Los Angeles.

These uncontroverted facts and others set forth above make it clear that the trial court did not err in granting judgment to Respondents on Gibson's claims, and that the California court of appeal was correct in affirming the judgment in its unpublished decision.

---

5. Gibson claims his criminal and antisocial activities are behind him, that he is a changed man, and that "anyone can change."

REASONS FOR DENYING THE WRIT

I.

TRADITIONAL TORT LAW ADDRESSES GIBSON'S FRAUD CLAIMS.

Gibson asserts that the appellate court erred in affirming the trial court's finding for Respondents on his fraud-like claims. The lower courts, however, were correct in holding that Gibson suffered no damages from any alleged fraud.

In his First Amended Complaint, Gibson alleges that he was duped into appearing on the May 3, 1994, "Geraldo" show. Gibson alleges that he was told his appearance would be a promotional one in which he was portrayed as a reformed Mafia assassin turned actor and anti-drug activist. Instead, he became a target of accusations of sexual harassment and other offensive conduct.

Even assuming the "facts" as Gibson alleges them in his First Amended Complaint, the only result of the alleged misrepresentations made to Gibson was his appearance on the show.[6] Gibson's mere appearance on the show — no matter how he arrived there — caused him no damage. It was the statements made about Gibson that allegedly *caused* damage to him.

This is undeniable. In his deposition, Gibson testifies that the purported lies said about him on the show are what injured him:

---

6. Obviously, Respondents vehemently oppose the characterization of events as put forth by Gibson. However, for the sake of their summary judgment motion, Respondents assumed the facts as Gibson presented them in his First Amended Complaint.

Q. Do you claim any lies were said on the Geraldo show on May 3, 1994, about you?

A. Yes.

Q. Do you claim that those lies hurt your reputation?

A. Yes.

Q. Do you claim that those lies caused you loss of income?

A. Yes.

Q. Do you claim that those lies caused you emotional distress?

A. Yes.

The letters purportedly from business associates withdrawing from their association with Gibson because of the show also indicate that it was the statements made about Gibson that caused them to sever their ties with Gibson — not the mere fact he appeared on the show. Obviously, then, Gibson's mere appearance on the show did not cause any damage — any purported damage was caused by what was said about Gibson.

Gibson states he informed "casting directors, investors, friends and associates" about his appearance on the "Geraldo" show, causing him "considerably more damage." Yet, other than his self-serving declaration, Gibson provides no evidence whatsoever that:

- Anyone received the notice;

- Anyone who received the notice paid any attention to it;

- Anyone who read the notice watched the show because of the notice (and would not have seen the show but for the notice);

- Anyone who watched the show solely because they received the notice believed what was said about Gibson; and

- Anyone who watched the show solely because they received the notice and believed what was said about Gibson, dealt with Gibson any differently as a result.

In fact, what evidence there is eviscerates Gibson's assertion. For example, Gibson's own manager, Wilt Melnick, testified he has never seen the "Geraldo" show, nor did he know Gibson was going to be on the show. Ellyn Stern, allegedly one of the producers/investors for a project that Gibson supposedly lost because of the show, never saw the show. Dr. Thomas Hines, another supposed investor in a project Gibson claims to have lost because of the show, never saw the show. Gibson simply cannot establish any of the "additional damage" he asserts.

It is equally clear that the statements made about Gibson would have been made whether or not he chose to appear on the show. Obviously, the show was live. Four guests were arranged to appear on the show to discuss Gibson. Rivera, Berman, and Pretlow controlled the topic of the show. Gibson provided no competent evidence that he would not have been

discussed in his absence. In fact, he was discussed before and after his brief appearance on the show.

Finally, there was no fraud. Gibson's fraud claims are premised on his speculation of an elaborate scheme involving "paid shills" and extraordinary efforts by Respondents to keep him in the dark about the show. However, *it is undisputed that the show, its topic, and the fact that it was being broadcast live from Los Angeles were publicly advertised prior to the airing of the show on May 3, 1994. TV Guide, The Los Angeles Times*, billboards seen by Gibson's assistant, and television and radio spots all announced the topic of the show and that it was being done live in Los Angeles.

Under California Code of Civil Procedure § 437c(n)(1), a cause of action has no merit if "[o]ne or more of the elements of the cause of action cannot be separately established."

With the Legislative amendments to Code of Civil Procedure § 437c in 1992 and 1993, it is clear that the failure by a plaintiff to state "specific facts" which prove the existence of a triable issue of material fact requires summary judgment for defendants. *Union Bank v. Superior Court*, 31 Cal. App. 4th 573, 590 (1995) (analyzing the new standards for summary judgment). It is equally clear that a plaintiff's failure to provide a sufficient factual nexus between defendants' alleged conduct (here, fraud) and plaintiff's alleged injury requires summary judgment for defendants. *Hunter v. Pacific Mechanical Corp.*, 37 Cal. App. 4th 1282, 1289 (1995) (speculation and conjecture as to causation will not prevent summary judgment for defendants).

Here, Gibson was unable to present any competent evidence — let alone clear and convincing evidence — that the fraud he alleges *caused* any damage to him. There is a vast amount of

evidence to support the trial court's decision granting Respondents summary adjudication on Gibson's fraud claims.

In his Petition, Gibson cites *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (M.D.N.C. 1995), for the proposition that conduct that occurs apart from publication may be actionable. Even *Food Lion* makes it clear, however, that "under [*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)], Food Lion cannot use its remaining claims to recover damages for injury to its reputation." *Food Lion*, 887 F.Supp. at 821. That is exactly what Gibson attempted to do.

Here, unlike the minimal damages awarded in *Food Lion*, Gibson presented *no* evidence of *any* damages suffered as a result of fraud.

II.

GIBSON NEVER ALLEGED NEGLIGENCE IN HIS DEFAMATION CLAIM.

From the onset of this litigation, Gibson has maintained that there was a conspiracy between and among the various defendants — including Respondents, "paid shills" who appeared on the "Geraldo" show, and others — to "get" Gibson by uttering known falsehoods.

Gibson has never contended that Respondents acted with negligence. Rather, Gibson has always contended — through the original complaint, a First Amended Complaint, and an Amendment to the First Amended Complaint — that the Respondents acted with actual malice and that they intentionally fabricated the allegations against Gibson and paid women to come onto the show to lie.

All discovery, propounded by both sides, focused on the allegations set forth in the complaints, namely that the defendants intentionally set out to "get" Gibson and fabricated the allegations against him. Gibson did not deviate from this alleged scenario during the entire litigation.

Consistent with his theory of the case, Gibson never put forth any evidence of negligence on the part of Respondents.[7]

In *Bostrom v. County of San Bernardino*, 35 Cal. App. 4th 1654, 1663 (1995), the court made it clear that:

> [S]ummary judgment cannot be *denied* on a ground not raised by the pleadings. (*Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal. App. 4th 1214, 1223 [32 Cal. Rptr. 2d 305] [complaint alleged failure to warn of manufacturing defect in boat; plaintiff could not avoid summary judgment by showing failure to warn based on postmanufacture discovery of defect]; *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal. App. 3d 111, 119-120 [266 Cal. Rptr. 749] [complaint alleged owner negligently maintained ski slopes; plaintiff could not avoid summary judgment by showing owner negligently cared for her after accident]; *Cochran v. Linn* (1984) 159 Cal. App. 3d 245, 250 [205 Cal. Rptr. 550] [complaint alleged products liability based on manufacture and sale of liquid protein diet; plaintiffs could not avoid summary judgment by showing defendant negligently wrote book promoting diet]; *see*

---

7. Respondents set forth, in some detail, what they did to put the show together. Those uncontested facts not only negate any inference of actual malice (which is the only allegation levied at Respondents in the pleadings), but also demonstrate that Respondents were not negligent in airing the show.

> *generally FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382 [282 Cal. Rptr. 508].)"
>
> If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it.

Bostrom, 35 Cal. App. 4th at 1664 (citing *Kirby v. Albert D. Seeno Construction Co.*, 11 Cal. App. 4th 1059, 1068 (1992).

In the instant case, Gibson never alleged — nor presented any evidence — that Respondents were negligent in doing the show. The appellate court, then, properly applied the actual malice standard as pled by Gibson and as set forth in numerous cases decided by this Court.

There is no need to create new law regarding this area of pleading.

III.

IF THE COURT IS INCLINED TO GRANT CERTIORARI, REVIEW OF PETITIONER'S STATUS AS A PUBLIC FIGURE IS MANDATED.

Gibson, who, by his own account, authored an autobiography which sold more copies than *The Godfather* and voluntarily appeared on defendant Rivera's nationally-televised talk show *to discuss Gibson's life* — past and present — claims to be a private figure. He is, however, a public figure for purposes of this action.

In the instant case, there is overwhelming uncontroverted evidence to support the trial court's finding that Gibson is a public figure. In fact, there is no dispute as to the material facts that form the basis of Gibson's status as a public figure. The appellate court erred when it failed to find substantial evidence to support the trial court's decision.

It is *uncontroverted* that Gibson himself contends that: as of 1993, he had been "interviewed in more than 200 magazines, 3,000 newspapers and 400 talk shows." He appeared on national television talk shows (including "Late Night with David Letterman" and "Good Morning America") and radio shows prior to the "Geraldo" show. He states that *Mafia Kingpin* was a best-seller that outsold *The Godfather*. He had spoken "to over 10,000 school kids, was interviewed by *People* Magazine, ABC, CBS and NBC affiliates, and prime time news shows." One newspaper article states, "Gibson said he has spoken to more than 600,000 youngsters and that he receives thousands of letters thanking him for sharing his experiences." He rented the famous outdoor billboard space in Times Square in New York City to promote himself. He has taken out full-page advertisements in the "trades." He has appeared as an actor on television and in motion pictures.

Respondents presented the trial court with two inches of publicity regarding Gibson that Gibson produced in discovery. Additionally, Respondents provided the trial court with more accounts of Gibson taken from WESTLAW.

A variety of newspaper stories predating the "Geraldo" show questioned Gibson's past, and his "change," including one article that resulted in a defamation suit in 1987 by plaintiff against *The Los Angeles Times*. That suit was dismissed by the court.

Nor can there be any question that Gibson has access to the media. Beyond the thousands of interviews he has done, Gibson has a publicist, an agent, and a manager. He has put out numerous press releases regarding this very case, as well as his other activities. He has taken out full page advertisements in the "trades." Ellyn Stern testified that she chose to use plaintiff as the star in her motion picture project because he has "tremendous PR ability."

The *undisputed* evidence, then, establishes that Gibson has thrust himself into the public eye and that he has access to channels of communication.

By virtue of his enormous voluntary public exposure, Gibson is a general purpose public figure as referred to in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and its progeny. He has laid bare all aspects of his life in his autobiography and thousands of interviews, hence, inviting scrutiny as to every aspect of his life (including his criminal and antisocial behavior) and his alleged "reformation."

Gibson also is a limited purpose public figure. Gibson has voluntarily injected himself into the public arena in at least three respects. First, his autobiography, speeches, and interviews put his whole life into the public arena. Second, Gibson publicly espouses the message that "anyone can change" and that his life serves as a public example that one who has committed criminal and other antisocial behavior in the past can reform and serve as a moral leader. Third, through his acting and movie-making career, Gibson has put himself before the public as an entertainer.

Indeed, *Gibson himself* argued in papers filed with the trial court: "Gibson thrust himself into the limelight to influence the public on the issue of his conversion, his acting, and his work to reform juveniles, not sexual harassment."

Gibson, then, is both a general purpose and a limited purpose public figure for the purposes of this case.

CONCLUSION

For the reasons stated above, no review is necessary by this Court and the petition for a writ of certiorari should be denied. If, however, the Court is inclined to grant certiorari, Respondents respectfully request that Petitioner's status as a public figure also be reviewed.

Respectfully submitted,

ALAN L. ISAACMAN
Counsel of Record
ROBERT S. FREIMUTH
ISAACMAN, KAUFMAN
& PAINTER
Attorneys for Respondents
8484 Wilshire Boulevard
Suite 850
Beverly Hills, CA 90211
(213) 782-7700

(3)

No. 98-313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SONNY GIBSON,
Petitioner,

vs.

GERALDO RIVERA, TRIBUNE COMPANY,
THE INVESTIGATIVE NEWS GROUP, INC.,
ASAP/GOODNIGHT AMERICA, INC., MARTIN BERMAN,
PENNY PRICE, CBS TELEVISION, INC. and
KCBS-TV LOS ANGELES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

GARY L. BOSTWICK
Counsel of Record

PAUL L. HOFFMAN

BOSTWICK & HOFFMAN LLP

100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401
(310) 260-9585

Counsel for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

11pp

No. 98-313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SONNY GIBSON,
Petitioner,

vs.

GERALDO RIVERA, TRIBUNE COMPANY, THE INVESTIGATIVE NEWS GROUP, INC., ASAP/GOODNIGHT AMERICA, INC., MARTIN BERMAN, PENNY PRICE, CBS TELEVISION, INC. and KCBS-TV LOS ANGELES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

GARY L. BOSTWICK
Counsel of Record

PAUL L. HOFFMAN

BOSTWICK & HOFFMAN LLP

100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401
(310) 260-9585

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. PETITIONER'S PROOF OF DAMAGES WAS MORE THAN SUFFICIENT TO SATISFY CALIFORNIA LAW IN THE ABSENCE OF THE COURT OF APPEAL'S MISINTERPRETATION OF THE CONSTITUTION 3

III. THE PLEADING ISSUE RESPONDENT RAISES FLOWS DIRECTLY FROM THE COURT OF APPEAL'S CONSTITUTIONAL ERROR 5

IV. THIS COURT SHOULD NOT REVIEW THE ISSUE OF WHETHER PETITIONER IS A PUBLIC FIGURE 7

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Brown v. Kelly Broadcasting Co.,
48 Cal.3d 711, 257 Cal.Rptr. 708 (1989) 6

Desnick v. American Broadcasting Companies, Inc.,
44 F.3d 1345 (7th Cir. 1995) 1

Dietemann v. Time, Inc.,
449 F.2d 245 (9th Cir. 1971) 1, 3, 4

Food Lion v. Capital Cities/ABC, Inc.,
887 F.Supp. 811 (M.D.N.C. 1995) 1

Gagne v. Bertran,
43 Cal.2d 481, 490, 275 P.2d 15, 21-22 (1954) . 4

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) *5*

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 2, 5, 6

STATUTES

California Civil Code § 48a 5

California Civil Code § 1709 4

California Civil Code § 3333 4

I.
INTRODUCTION

Respondents do not address the serious constitutional claims raised in the Petition. Instead, Respondents attempt to insulate the Court of Appeal's erroneous federal constitutional rulings from review in this Court by claiming, despite the obvious federal basis for the lower court's rulings, that the decision below was based entirely on state law grounds.

Respondents do not address the clear conflict in the Circuits concerning the First Amendment limitations on tort claims based on the manner in which "news" is gathered or disseminated, as opposed to the substance of the "news." *Compare Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) *with Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995). *See also Food Lion v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811 (M.D.N.C. 1995).

This conflict exists in this increasingly contentious area of media law and this case squarely presents the issue of the First Amendment limits on the kind of "ambush" technique employed by the Geraldo Rivera Show and other entertainment shows of its ilk.

Respondents' only response to Petitioner's news gathering tort claim is to argue that review in this Court is improper because Petitioner provided no evidence of damages. However, the Court of Appeal's discussion on the damages issue flows directly and inextricably from its faulty First Amendment analysis challenged in this Petition. Absent the federal constitutional decision made by the Court of Appeal, Petitioner would have been entitled to his

day in court under established California law. *See* §II, *infra*.

Similarly, Respondents attempt to direct this Court's attention from the Court of Appeal's profound misreading of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), by claiming that Petitioner never alleged negligence and so could not pursue a private figure defamation claim after the Court of Appeal correctly overturned the trial court's finding that Petitioner was a public figure.

However, the issue in this Court is not whether Petitioner had to plead negligence; the issue is whether the Court of Appeal imposed a burden of proving constitutional malice on Petitioner because of a misreading of this Court's decision in *Hepps*. Indeed, Respondents' opposition demonstrates how completely the Court of Appeal's analysis depended on what it, erroneously, believed was required by this Court's decision in *Hepps*. The reason Petitioner lost was that he was found not to have provided evidence of constitutional malice under this Court's decisions. Thus, whether Petitioner pleaded negligence or intentional misconduct, the crucial point is that Petitioner should not have been required, as a private figure, to plead and prove constitutional malice. Without this burden, Petitioner would have been entitled to have a jury decide his claims.

The confusion in the Court of Appeal's opinion is based on a misreading of this Court's decisions regarding private figure defamation cases against the media. This Court should review this case to make it clear that the First Amendment does not displace California defamation law in

private figure cases, at least with respect to claims for compensatory or general damages.

II.
PETITIONER'S PROOF OF DAMAGES WAS MORE THAN SUFFICIENT TO SATISFY CALIFORNIA LAW IN THE ABSENCE OF THE COURT OF APPEAL'S MISINTERPRETATION OF THE CONSTITUTION

In *Dietemann* damages were found allowable for surreptitious taping of true facts tending to put the plaintiff in a bad light because of the media defendants' "calculated misdeed" in lying to gain entry. Such damages were distinct from any damages for the broadcast of defamatory statements. Here, Petitioner made the same type of claim and introduced substantial evidence that he had been harmed by defendants' fraudulent activities.

This evidence of Petitioner's damages may be summarized as follows: Petitioner received a telephone call from Respondent Price, who claimed to be a producer of "The Geraldo Show." Price represented to Petitioner that the topic of an upcoming Geraldo Show was "Women Who Married Men in the Mafia." In fact, the producers of the show planned to ambush Gibson by confronting him with two women who said that he had sexually harassed them during casting sessions. Petitioner, not knowing this, conditioned his appearance on the show upon the show's announcing that he had completely reformed and left behind his life of crime and to highlight his work as a motion picture actor and his volunteer work to educate youngsters on the dangers of drug use. Petitioner arranged to send

notices that he would be appearing on the show to hundreds of casting directors in the area. When the show aired, he was severely humiliated because he had notified influential people to watch the show that turned out to be an ambush. Persons saw the show that were unlikely to see it otherwise. After the broadcast and re-broadcast of the show, Petitioner received notice that film projects had been canceled as a result of his appearance on the show. Basically, after the ambush show, he did not work as an actor.

There is no doubt that such damages are ordinarily allowable for these state law claims under established California law. California Civil Code §§ 1709 and 3333; *Gagne v. Bertran*, 43 Cal.2d 481, 490, 275 P.2d 15, 21-22 (1954).

Ignoring these traditional principles, the Court of Appeal was seduced by Respondents' simplistic but erroneous assertion that "Gibson's mere appearance on the show -- no matter how he arrived there -- caused him no damage." Pet. App. 14a. This, of course, was not an empirical observation, in light of the ample evidence of damages described above. Nor was it an accurate statement of California law.

This erroneous statement flowed from the Court of Appeal's rejection on First Amendment grounds of Petitioner's basic theory of the case which derives directly from the *Dietemann* side of the split in authority Petitioner asks this Court to resolve in this case.

III.
THE PLEADING ISSUE RESPONDENT RAISES FLOWS DIRECTLY FROM THE COURT OF APPEAL'S CONSTITUTIONAL ERROR

The reason Petitioner had summary judgment entered against him was the Court of Appeal's misunderstanding of *Philadelphia v. Hepps*, 475 U.S. 767 (1986), not any technical pleading issue under state law. The Court of Appeal properly found Petitioner to be a private figure. Pet. App. 7a-8a. However, it then misunderstood this Court's decision in *Hepps* to require Petitioner to prove constitutional malice with convincing clarity in order to prevail on any aspect of his defamation claim, even his claims for general damages under California Civil Code §48a, simply because he was making a claim for punitive damages against a media defendant. Pet. App. 9a.

This reading of this Court's cases is wrong and imposes a First Amendment based restriction on state-crafted defamation claims which is unjustified and unwarranted under *Hepps* or any of this Court's cases. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

There is no requirement in California law that a private figure plaintiff must prove constitutional malice if claiming punitive damages. Moreover, there is no state law requirement to prove malice at all to be entitled to general damages. Civil Code §48a allows for general damages for loss of reputation, shame, mortification and hurt feelings. Under California law, a private figure defamation plaintiff need not prove constitutional malice at all to obtain such

damages. *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 257 Cal.Rptr. 708 (1989). The focus on mental state in the Court of Appeal's decision derives entirely from this Court's case law.

Thus, the Court of Appeal's federal constitutional error is solely responsible for its dismissal of Petitioner's otherwise valid state law defamation claims for general and other damages. Petitioner was entitled to prove defendants' intentional scheme, even in the absence of negligence allegations, without having to prove "constitutional malice with convincing clarity" (Pet. App. 9a) -- a requirement that the Court of Appeal erroneously believed it was required to impose on Petitioner based on this Court's decision in *Hepps*.

The Court of Appeal conflated the First Amendment requirement of showing constitutional malice with Petitioner's allegations that Respondents engaged in intentional misconduct. Such intentional misconduct, could be proved to satisfy the elements of a California defamation claim based upon a standard wholly unrelated to the constitutional malice requirement imposed by the First Amendment. By conflating and confusing these principles, the Court of Appeal's required Petitioner to shoulder a First Amendment burden beyond the requirements in this Court's cases properly construed.

This Court should take this opportunity to clear up the confusion caused by its decisions in private figure defamation cases against media defendants.

IV.
THIS COURT SHOULD NOT REVIEW THE ISSUE OF WHETHER PETITIONER IS A PUBLIC FIGURE

Respondents have not filed a timely cross-Petition for a Writ of Certiorari on the public figure issue. Nor have they given any compelling reason why that issue is appropriate for review in this Court. This Court should limit its review to the questions presented by Petitioner.

CONCLUSION

For all of these reasons, the Petition should be granted.

Respectfully submitted,

Gary L. Bostwick
Counsel of Record

Paul L. Hoffman
BOSTWICK & HOFFMAN, LLP
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401

Counsel for Petitioner